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August 10, 2004

Ms. Éloïse Arbour
Secretary to the Rules Committee
Federal Court of Appeal
Ottawa ON K1A 0H9

Dear Ms. Arbour:

Re: Impact of Class Action Rules on Lawsuits by Aboriginal Nations in Federal Court

The National Aboriginal Law Section of the Canadian Bar Association (the CBA Section) is writing to convey concerns about the new Federal Court class action rules.[1]

The CBA Section requests the Rules Committee consider the reimplementation of the representative actions as an alternative to class actions in appropriate circumstances. In the CBA Section's view, repeal of the representative actions rule in the Federal Court will have an adverse effect on the ability of First Nations to advance their claims in the most efficient and appropriate manner. In this letter, the CBA Section will identify the fundamental difference between the class and representative actions, a difference that is especially relevant to Aboriginal law issues. We will also highlight the procedural, purposive and constitutional issues that lead to our conclusion.

CLASS VS. REPRESENTATIVE ACTIONS

The distinction between class actions and representative actions has been identified as "on the one hand, actions [are] being maintained by persons who have the 'same interest' in the proceedings, and on the other, actions being maintained by persons where there is a 'common issue of law or fact' at stake."[2] Essentially, the difference between the two actions is whether the commonality is derived from the nature of the parties *or* the nature of the issues. Despite the intermingling of the two different types of actions, the two have historically served very different purposes and arguably should continue to do so in the Federal Court.

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1 *Rules Amending the Federal Court Rules, 1998*.

2 Maggie Doyle, "The Nature of Representative or Class Actions in the Context of Compensation Claims against Resource and Utilities Companies" (1999) Australian Mining and Petroleum Law Yearbook at http://www.ampla.org/publications/yearbk99_sum1.htm.

500 - 865 Carling, Ottawa, ONTARIO Canada K1S 5S8
Tel/Tél. : (613) 237-2925 Toll free/Sans frais : 1-800-267-8860 Fax/Télécop. : (613) 237-0185
Home Page/Page d'accueil : www.cba.org E-Mail/Courriel : info@cba.org

For First Nations or other Aboriginal communities, advancing claims as representative actions is premised on a *commonality derived from their specific nature as a party* to litigation. As noted in *Woodward's Native Law:*

> … the band, as an enduring entity with its own government, is a unique type of legal entity under Canadian law. The rights and obligations of the band are quite distinct from the accumulated rights and obligations of the members of the band.[3]

From an Aboriginal perspective, "association with their … collectivities is central to individual and community identity"; [4] advancing their claims as a collective is a reflection of their cultural and political identity, as well as the nature of the rights claimed. The members of First Nations are not "merely individuals living in a close vicinity to each other, who might happen to enjoy a particular common interest in the favourable outcome of a court decision."[5]

CERTIFICATION OF A CLASS ACTION UNDER THE NEW RULES

Class action legislation is now in place in five provinces, requiring certification of the class and the appointment of a representative plaintiff when there are common issues of law or fact at stake. Class action legislation in Ontario, Newfoundland and British Columbia explicitly states that it does not apply to representative proceedings thereby maintaining the distinction between the two types of actions.

Certain conditions of certification under the Federal Court Rules are similar to those of the provincial statutes. The initial requirement that the pleadings disclose a reasonable cause of action is not specific to class actions but is applicable to all actions. Two other requirements for certification are that there is an identifiable class and that the claims raise common questions of law or fact. A First Nations litigant raising a communal claim, by the nature of the claim, often meets both of these requirements.

The Federal Court Rules require a representative plaintiff who fairly and adequately represents the interests of the class. The representative plaintiff must show a plan to advance the action and to notify class members how the proceeding is progressing. On the common issue(s), the representative cannot have an interest in conflict with the interests of other class members. For First Nations, each of these criteria is met when the Chief or Council acts on behalf of the Band because "in law, a band is recognized as being in a class by itself."[6]

The final requirement under the new Federal Court Rules is that a class action be the preferable procedure for the proceeding and requires the judge to consider all relevant matters when making this determination. This includes consideration of whether the class action would involve claims that are or have been the subject of any other action. This requirement may prove problematic in Aboriginal law matters because there are often conflicting claims. The judge must also determine

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3 Jack Woodward, *Native Law*, loose leaf (Toronto: Thomson Carswell, 1994) at 398.

4 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (Ottawa: Minister of Supply and Services Canada, 1996) at 1015 (Co-Chairs: Rene Dussault and Georges Erasmus).

5 *Weyweyakum Indian Band* v. *Canada and Weyweyakai Indian Band*, [1992] C.N.L.R. at 177.

6 *Woodward's Native Law*, *supra* note *3*, at 399.

if there are more efficient means of resolving the claim. Arguably, a representative action is more efficient because it does not involve an additional certification hearing that is redundant when the action is brought by the Chief or Council on behalf of the First Nation. Aboriginal litigation is a notoriously arduous process, often taking many years to complete. Adding procedural hurdles simply extends the process further and increases the cost of pursuing a claim.

PROCEDURAL ISSUES

In some cases, the problem can be adequately dealt with by relying on *Sawridge Band v. Canada*.[7] In *Sawridge*, the Court confirmed that a Band has the capacity to sue in its own right after the Court dismissed the Crown's motion for an order compelling the Band to seek certification. In so doing, the Federal Court affirmed the holding in *Weyweyakum* on the issue of capacity that:

> the members of an Indian band as such and quite apart from any provisions of the *Indian Act*, must necessarily enjoy a special legal status derived from their existence as a separate society and from common fundamental and special tribunal [sic] customs, laws, privileges, rights and obligations [and] there seems to me to be no logical reason why Indian bands, as such should not possess the same rights to sue as corporation for instance, and, similarly, to be subject to various resulting obligations.[8]

Presumably, if the capacity of the band has been decided, there is no longer any need for naming the Chief on behalf of the Nation as a party. However, actions on behalf of First Nations are still regularly framed this way, either out of an abundance of caution or because the collective right claimed in a given case does not necessarily vest in the band as a creation of the *Indian Act.*

PROBLEMS FOR FIRST NATIONS

Some counsel are finding that the new Federal Court Rules are presenting significant problems. In one case, the federal Crown insisted that the First Nation's action be certified, despite the case commencing well before the new Federal Court Rules. The Court suggested that the issue was best resolved between the parties, rather than by an order. The subsequent negotiations between the parties to develop a consent order were problematic and time-consuming and thus increasing the costs to the parties.

It has been argued that the resulting obligations of proceeding in the name of the band, pursuant to *Weyweyakum* and *Sawridge*, precludes damages for pain and suffering, as well as any postponement of limitations arguments. This argument is premised on the jurisprudence of corporations where the capacity of the band to sue is akin to that of a corporation. The band, therefore, cannot suffer pain nor can it be under a disability for limitation purposes. So proceeding in this manner may fetter the claim, rather than advance it.

Further, the new Rules generally prohibit the award of costs for a class action (Rule 299.41(1)). In a specific example, where the First Nation was arguing a motion for document production, it was advised by the case management judge that costs were not available in a class action.

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7 [2003] F.C.J. No. 846 (T.D.) (QL).

8 *Weyweyakum*, *supra* note 5.

Although Rule 299.41(2) does allow for costs in exceptional circumstances, establishing those circumstances may increase expenses and the motion may be unsuccessful in any event.

The ability of First Nations to bring their claims to Federal Court may be severely compromised by the changes to the Rules. As a result, First Nations claims may suffer no matter which style of proceeding is used. When proceeding as a class action, certification is required and costs are generally unavailable. When proceeding in the name of the band, recent jurisprudence on corporations may be applicable and the band may not be able to seek damages for pain and suffering, nor can they avail themselves of certain limitations arguments. In either case, the ability to assert the communal rights of First Nations is hindered.

THE PURPOSIVE ISSUES

There are some general purposive issues that arise. In any litigation, it is critical that the court has the correct parties and the correct issues before it. Also, the defendant must have proper notice of the nature of the claim and the identity of the claimants. In a recent decision of *Hollick v. Toronto (City),*[9] the Supreme Court of Canada held that the purposes of class action are to promote judicial economy, access to justice and behaviour modification. McLachlin C.J.C., noted it was necessary to undertake a contextual analysis of the fair and efficient management of the action, as well as the availability and preferability of procedure. The CBA Section submits the amendments to the Rules, in the context of First Nations' litigation, may actually serve to negate these purposes.

While it is appropriate to ensure that the person making a claim on behalf of a First Nation has the authority to do so, it is not necessary to require the Court to certify the representative capacity of a duly elected Chief and Council. It contradicts the principle of judicial economy, which is one of the fundamental purposes of a class action. Reserve communities already have an appointed representative with a clear mandate from the "class", as well as a clearly delineated membership. Indeed, the "class" contemplated has already been fully identified for the most common defendant in these types of matters: Indian and Northern Affairs.

Access to justice may also be more limited because the cost of the certification proceeding exacerbates the already difficult circumstances of First Nations attempting to fund an action to assert their rights:

> The preliminary matter of certification, intended to be a mini-hearing, usually turns into a maxi-hearing ... often more complex than the trial of the substantive issues (if the case ever proceeds that far) and, as there is so much discretion involved, there are often several appeals … certification serves as a chilling deterrent to the use of class actions.[10]

Finally, the goal of behaviour modification is rarely achieved when defendants are given procedural tools that serve to prevent the advancement of claims in the most effective manner, purely as a result of the claimant's immutable legal status. This is especially so when the corresponding arguments and remedies available to them are then limited. In the context of Aboriginal litigation, none of the broad policy objectives of class actions will be met under the

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9 [2001] 3 S.C.R. 158 (S.C.C.) at para. 27.

10 Andrew J. Roman, "Class Actions in Canada: The Path to Reform?" (August 1988) Advocates' Soc. J. No. 4, at 28-32.

new Rules. Indeed, the behaviour that most likely needs to be modified is that of a legal system that only recognizes an aggregation of individual claims, rather than a truly communal one.

As noted, First Nations can still proceed in the name of the band with the corresponding restrictions on arguments and remedies. Significant judicial resources may be expended to determine whether this restrictive jurisprudence is equally applicable to a band and as a result, proceeding in the name of the band may end-up a false economy.

CONSTITUTIONAL ISSUE

Since at least 1982, bands, treaty Indians and First Nations with existing Aboriginal rights have been granted a constitutional capacity to bring suits in their own name. The Federal Court, established pursuant to s. 101 of the *Constitution Act*, 1867, does not have the jurisdiction to affect constitutional rights through the imposition of procedural rules. It is therefore arguable that the new Rules cannot apply to bands. They may also be inapplicable if the claim is for existing Aboriginal rights, regardless of whether the action is brought by the band itself.

CONCLUSION

While numerous opinions have been expressed both for and against the recent change to the Federal Court Rules, it is hard to determine what the result will be until the issue is squarely before the Court. In *Sawridge*, it was unnecessary for the court to determine if there was sufficient residual discretion under Rule 55 to maintain the action as a representative one despite the repeal of Rule 114. Until such a determination is necessary, counsel should be aware of these issues when considering how to frame their action and expect that, at least for the moment, the Rule change will likely make the issues more complex for First Nations litigants, rather than less so.

With respect to Aboriginal Nations and First Nations bands, this is potentially going to have serious implications far beyond the intention of the Rules Committee. The CBA Section requests the Rules Committee consider the reimplementation of the representative actions as an alternative to class actions in appropriate circumstances.

Yours truly,

(*original signed by Trevor Rajah for Jeffrey Harris*)

Jeffrey F. Harris
Chair, National Aboriginal Law Section